

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DAVID G. MARTINEZ and CHILLY  
WILLY'S HANDYMAN SERVICES,  
LLC

Petitioners,

EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA IN AND  
FOR THE COUNTY OF CLARK; THE  
HONORABLE RONALD J. ISRAEL,  
DISTRICT JUDGE,

and

TAYLOR MILES CAPE, and individual,

Respondents.

Supreme Ct. Case No. Electronically Filed  
Dec 14 2021 11:33 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Dist. Ct. Case No.:  
A-20-818569-C

**PETITION FOR WRIT OF MANDAMUS**

RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
DENNETT WINSPEAR, LLP  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Attorneys for Defendant,  
CHILLY WILLY'S HANDYMAN  
SERVICES, LLC

JOHN T. KEATING, ESQ.  
Nevada Bar No. 006373  
KEATING LAW GROUP  
9130 W. Russell Road, Suite 200  
Las Vegas, Nevada 89148  
Attorneys for Defendant,  
DAVID G. MARTINEZ

## **TABLE OF CONTENTS**

Table of Authorities.....	iii
NRAP 26.1 Disclosure.....	v
Attorney’s Certificate of Compliance.....	vii
NRAP 21(a)(5) Verification.....	viii
Petition for Writ of Mandamus.....	1
Jurisdiction.....	3
Routing Statement.....	4
Statement of the Issues.....	5
Facts and Procedural History.....	6
A.    Subject Accident and Alleged Injuries.....	6
B.    The Discovery Commissioner’s Ruling.....	6
C.    The District Court’s Ruling.....	8
Argument	
A.    Mandamus is the Appropriate Relief.....	8
B.    The Standard of Review.....	10
C.    The District Court Abused its Discretion.....	10
1.    The District Court erred in holding that Petitioners waived their constitutional challenge to NRS 52.380, failing to provide the Petitioners an opportunity to serve the Attorney General, and failing to consider the constitutional challenge on its merit.....	10

2.	The District Court erred in holding that the Legislature Passing NRS 52.380 and the Governor signing it into law Constitutes “good cause” under NRCP 35 to allow for a third-party observer and audio recording of the full examination.....	13
3.	The District Court abused its discretion by conditioning the NRCP 35 Examination on the Requirement that Dr. Etcoff, Or any other Nevada licensed psychologist/neuropsychologist, Violate his professional and ethical duties.....	18
4.	The District Court’s order makes it impossible for Nevada psychologists and neuropsychologists to perform Rule 35 psychological/neuropsychological exams and creates an unfair advantage for the Plaintiff.....	21
5.	Rule 35 Should be Construed in Harmony with NAC 641.250.....	23
6.	Conclusion and Relief Sought.....	23

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Okada v. Eighth Judicial Dist. Ct.</i> , 134 Nev. 6, 408 P.3d 566 (2018).....	8-9
<i>D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.</i> , 124, Nev. 468, 168 P.3d 731 (2007)...	9
<i>Canarelli v. Dist. Ct.</i> , 136 Nev.Adv.Op., 464 P.3d 114 (2020).....	10
<i>Shores v. Global Experience Specialists, Inc.</i> , 422 P.3d 1238 (2018).....	10
<i>United States Department of the Treasury-IRS v. EB Holdings II, Inc.</i> , 2021 WL 535467 (D.Nev. 2021).....	10
<i>Leven v. Frey</i> , 123 Nev. 399, 168 P.3d 712 (2007).....	11

<i>Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Ct.</i> , 123 Nev. 44, 152 P.3d 737 (2007).....	12
<i>Crowley v. Duffrin</i> , 109 Nev. 597, 855 P.2d 536 (1993).....	12
<i>Berkson v. Lepome</i> , 126 Nev. 492, 245 P.3d 560 (2010).....	14-15
<i>Secretary of State v. Nevada State Legislature</i> , 120 Nev. 456, 93 P.3d 746 (2004).....	14
<i>Commission on Ethics v. Hardy</i> , 125 Nev. 285, 212 P.3d 1098 (2009).....	14
<i>Halverson v. Hardcastle</i> , 123 Nev. 245, 163 P.3d 428 (2007).....	14
<i>Galloway v. Truesdell</i> , 83 Nev. 13, 422 P.2d 237 (1967).....	15
<i>State v. Dist. Ct. [Marshall]</i> , 116 Nev. 953, 11 P.3d 1209 (2000).....	15
<i>Freteluco v. Smith’s Food and Drug Centers, Inc.</i> , 336 F.R.D. 198 (D.Nev. 2020).....	16
<i>Executive Management, Ltd. v. Ticor Title Ins. Co.</i> , 118 Nev. 46, 38 P.3d 872 (2002).....	16
<i>Flack v. Nutribullett, LLC</i> , 33 F.R.D. 508 (C.D.Cal. 2019).....	17
<i>Valley Health System, LLC v. Eighth Judicial Dist. Ct.</i> , 127 Nev. 167, 252 P.3d 676 (2011).....	20-21
<i>Painter v. Atwood</i> , 2013 WL 5428059 (D.Nev. 2013).....	22
<i>Ashley v. City &amp; Cnty of San Francisco</i> , 2013 WL 2386655 (N.D. Cal. 2013).....	22
<i>Ragge v. MCA/Universal Studios</i> , 165 F.R.D. 605 (C.D.Cal. 1995).....	22

<i>Sheriff, Clark County v. Burcham</i> , 124 Nrv. 1247, 198 P.3d 326 (008).....	22
<i>Figueroa-Beltran v. United States</i> , 136 Nev. 386, 467 P.3d 615 (Nev. 2020).....	23
<i>Clay v. Eighth Judicial Dist Ct.</i> , 129 Nev. 445, 305 P.3d 898 (2013).....	23
<i>City of North Las Vegas v. Warburton</i> , 127 Nev. 682, 262 P.3d 715 (2011).....	23

## **Statutes**

NRS 52.380.....	15-16
NRS 30.130.....	11
NRS 34.170.....	8
NRS 2.120.....	15

## **Rules**

Nevada Rules of Civil Procedure, Rule 35.....	15-16
---	-------

## **Constitutional Provisions**

Nev. Const. Art. 3, §1.....	14
-----------------------------	----

## **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certify that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock. CHILLY WILLY'S HANDYMAN SERVICES, LLC

is a limited liability company, which is not a publicly held company. It is 100% owned by Reynaldo Molina.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Dennett Winspear, LLP represents CHILLY WILLY’S HANDYMAN SERVICE, LLP, in the District Court and this Court.

3. If litigant is using a pseudonym, the litigant’s true name: Petitioner CHILLY WILLY’S HANDYMAN SERVICE. Otherwise, there is no pseudonym.

4. DAVID G. MARTINEZ is an individual, and is represented by John T. Keating, Esq. and Keating Law Group, in the District Court and in this Court.

DATED: 12/14/21

**DENNETT WINSPEAR, LLP**

By: /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Attorneys for Defendant,  
Chilly Willy’s Handyman Service, LLC.

DATED: 12/14/21

**KEATING LAW GROUP**

By: /s/ John T. Keating  
JOHN T. KEATING, ESQ.  
Nevada Bar No. 6373  
9130 W. Russell Road, Suite 200  
Las Vegas, Nevada 89148  
Attorneys for Defendant,  
David G. Martinez

**ATTORNEY'S CERTIFICATE OF COMPLIANCE**

1. Undersigned counsel certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

2. Undersigned counsel further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,283 words.

3. Finally, undersigned counsel certify they have read this petition, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. Undersigned counsel further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. Undersigned counsel understand they may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

///

DATED: 12/14/21

**DENNETT WINSPEAR, LLP**

By: /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Attorneys for Defendant,  
Chilly Willy's Handyman Service, LLC.

DATED: 12/14/21

**KEATING LAW GROUP**

By: /s/ John T. Keating  
JOHN T. KEATING, ESQ.  
Nevada Bar No. 6373  
9130 W. Russell Road, Suite 200  
Las Vegas, Nevada 89148  
Attorneys for Defendant,  
David G. Martinez

**NRAP 21(A)(5) VERIFICATION**

The undersigned attorneys are lead counsel for the Petitions in A-20-818569-C and this Petition. Undersigned counsel believe the facts stated in this Petition are true to the best of the information available to them. Undersigned counsel declare under penalty of perjury the foregoing is true and correct, per NRS 53.045.

DATED: 12/14/21

**DENNETT WINSPEAR, LLP**

By: /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Attorneys for Defendant,  
Chilly Willy's Handyman Service, LLC.

DATED: 12/14/21

**KEATING LAW GROUP**

By: /s/ John T. Keating  
JOHN T. KEATING, ESQ.  
Nevada Bar No. 6373  
9130 W. Russell Road, Suite 200  
Las Vegas, Nevada 89148  
Attorneys for Defendant,  
David G. Martinez



## **PETITION FOR WRIT OF MANDAMUS**

TO: THE HONORABLE SUPREME COURT OF THE STATE OF NEVADA

Pursuant to NRAP 21, Defendants/Petitioners CHILLY WILLY'S HANDYMAN SERVICES, LLP and DAVID G. MARTINEZ ("Petitioners"), by and through their undersigned counsel, hereby petition this Court for an extraordinary writ of mandamus: (1) holding that Petitioners' failure to serve a copy of their Objection to the Nevada Attorney General did not constitute a waiver of their argument that NRS 52.380 is unconstitutional, the district court should have provided Defendants an opportunity to serve a copy of the Objection on the Attorney General, and the district court should have considered the constitutional issue on its merits; (2) holding that NRS 52.380 is unconstitutional in that it violates the separation of powers doctrine; (3) compelling the district court to comply with Nevada Rules of Civil Procedure (NRCP) 35(a)(4)(A)(ii) and NRCP 35(a)(3) and grant its Objection; (4) compelling the district court to issue an order denying Plaintiff the presence of an observer and an audio recording of his full neuropsychological examination; (5) compelling the district court to issue an order that allows Plaintiff's expert to have direct access to Dr. Etcoff's raw test data, test questions and related materials but does not allow the Plaintiff's attorney direct access to that information; and (6) establishing the applicable good cause standards for NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3).

This Petition is based upon the grounds that the district court's Order Denying Defendants' Objection to Discovery Commissioner Report and Recommendation dated October 18, 2021, was based on a misapplication of NRS 31.130, disregard of controlling law pertaining to the separation of powers doctrine, and without any legal and/or factual basis or evidence to establish good cause under NRCP 35 for the conditions placed on the neuropsychological Rule 35 exam of Plaintiff, which constitutes a clearly erroneous decision and a clear abuse of discretion.

This Petition is also based upon the ground that Petitioners have no plain, speedy and adequate remedy in the ordinary course of law; this is Petitioners' one and only opportunity to conduct a neuropsychological examination of Plaintiff in defense of this action. The Petition raises important issues of law that require clarification, and considerations of sound judicial economy and administration militate in favor of granting the Petition. There are four other Writs before this Court relating to NRCP 35 and/or NRS 52.380. *Moats v. Dist. Ct* (Burgess), Case No. 81912, *Lyft, Inc. v. Dist. Ct* (Davis), Case No. 82148, *Yusi v. Dist. Ct.* (Felsner), Case No. 82625, and *Ferrellgas, Inc. v. Dist. Ct.* (Green), Case No. 82670. If this Court does not exercise its discretion in this matter, irreparable harm will be done to the Petitioners. Initial expert disclosures are due January 7, 2021. Discovery closes March 7, 2022. Trial is currently set for June 27, 2022.

## **I.**

### **JURISDICTION**

This Court has original jurisdiction pursuant to Article 6, Section 4 of the Nevada Constitution. On November 22, 2021, The Honorable Ronald J. Israel, Department XXVIII of the Eighth Judicial District Court (“district court”) denying Petitioners’ Objection finding Petitioners had waived their constitutional challenge to NRS 52.380 and that there is good cause under NRCP 35 for an observer and audio recording of the full Rule 35 neuropsychological exam of Plaintiff, and good cause to condition the exam on the raw test data, test questions and related materials being shared with Plaintiff’s expert, who can share it with Plaintiff’s attorney.

That decision was clearly erroneous because the district court erroneously ruled NRS 31.130 required Petitioners to mail a copy of the Objection to the Secretary of State, not the Attorney General, and NRS 31.130 does not provide failure to serve the Secretary of State (or Attorney General) constitutes waiver of constitutional arguments. Petitioners should have been provided an opportunity to provide notice to the Attorney General of their Objection, and the district court should have considered the constitutional arguments on their merits. Moreover, the evidence did not support the district court finding good cause to condition the Rule 35 examination upon the presence of a third-party observer and audio recording

during the neuropsychological test portion of the exam, and allowance of the raw test data, materials and related materials to be shared with Plaintiff's attorney.

Petitioners have no plain, speedy, or adequate remedy at law. Important issues of law require clarification regarding the constitutionality of NRS 52.380 and the good cause standards under NRS 35, such that public policy is served by the Supreme Court's invocation of its original jurisdiction. There will be irreparable harm to Petitioners, parties and the public if the Court does not exercise its discretion because Rule 35 exams are a critical and regular aspect of civil litigation.

## **II.**

### **ROUTING STATEMENT**

This Petition challenges a discovery order. The Supreme Court should retain this case for decision per NRAP 17(a)(11) and (12) because it raises a question of first impression involving the Nevada Constitution, a question of statewide public importance, and there is a conflict between district courts as to the issues raised herein. Petitioners assert NRS 52.380 is unconstitutional pursuant to Nevada's separation of powers doctrine. Further, this Petition addresses under what conditions a district court in Nevada can compel a neuropsychological Rule 35 exam. District courts disagree as to these issues. See docket numbers 81912, 82148, 62625, and 82670.

### III.

#### **STATEMENT OF THE ISSUES**

1. Whether the district court erred in determining Petitioners waived their ability to challenge the constitutionality of NRS 52.380, pursuant to NRS 31.130, because it did not serve a copy of the Objection on the Secretary of State.

2. Whether the district court should have allowed Petitioners an opportunity to serve a copy of the Objection on the Attorney General and considered the constitutional argument on its merits.

3. Whether the district court erred in finding the Legislature passing NRS 52.380 and the Governor signing it into law constituted good cause under Rule 35 for a third-party observer and audio recording of that *full* exam.

4. Whether the district court erred in conditioning the Rule 35 examination of Plaintiff on Petitioner's neuropsychologist expert, Dr. Lewis Etcoff, sharing the raw test data, test questions and related materials with Plaintiff's neuropsychologist expert, who is then free to share the same with Plaintiff's attorney.

5. Whether the district court erred in conditioning the neuropsychological Rule 35 examination on the requirement that Dr. Etcoff, or any other Nevada licensed psychologist/neuropsychologist, violate his professional and ethical obligations.

The issues presented to this Court are discrete and have never been previously considered in the context of the facts of this case and the current NRCP 35.

#### **IV.**

#### **FACTS AND PROCEDURAL HISTORY**

##### **A. Subject Accident and Alleged Injuries.**

Plaintiff alleges he was involved in an automobile accident at the intersection of Durango Drive and Osa Blanca Street in Las Vegas, in which he asserts an ongoing concussive brain injury, concentration difficulty, sensitivity to light and noise, short term memory loss and blurred vision. Plaintiff further alleges permanent cognitive damage.<sup>1</sup> Plaintiff claims past and future medical specials in the amount of approximately \$5.7 million.<sup>2</sup>

##### **B. The Discovery Commissioner's Ruling.**

While Plaintiff agreed to undergo a NRCP 35 examination with neuropsychologist Dr. Etcoff<sup>3</sup>, he conditioned the full examination on a third-party observer or the exam being video recorded, that Dr. Etcoff share his test data, test questions and related materials with Plaintiff's counsel, and the exam being limited to one day, not the standard two days.<sup>4</sup> Petitioner's position was that Dr. Etcoff was

---

<sup>1</sup> Appendix Volume II, at APP000358; APP00096-APP00097

<sup>2</sup> Appendix Volume I, at APP00007; APP000117.

<sup>3</sup> Appendix Volume I, at APP0009.

<sup>4</sup> Appendix Volume I, at APP0005-APP006.

ethically and professionally prohibited from allowing an observer at the exam, that he is ethically and professionally limited to providing raw test data, including test questions and related materials to Plaintiff's attorney, and the exam should take two-days.<sup>5</sup> Petitioners filed a motion to compel the Rule 35 examination.

After oral arguments, the Discovery Commissioner ruled as follows:

- There was good cause to allow third-party observation and audio recording of the full exam; the observer can be present outside the examination room and can listen with the door open<sup>6</sup>;
- “[The] good cause . . . is the Legislature passed NRS 52.380 and the governor signed it into law”<sup>7</sup>;
- The examination cannot be videotaped<sup>8</sup>;
- The examination can take place over a two-day period<sup>9</sup>; and
- The raw test data/test questions and other exam materials must be provided to Plaintiff's expert who may share it with Plaintiff's attorney.<sup>10</sup>

---

<sup>5</sup> Appendix Volume II, at APP000309.

<sup>6</sup> Appendix Volume I, at APP000350.

<sup>7</sup> Appendix Volume I, at APP000350.

<sup>8</sup> Appendix Volume I, at APP000350.

<sup>9</sup> Appendix Volume I, at APP000350.

<sup>10</sup> Appendix Volume I, at APP000350.

### **C. The District Court’s Ruling.**

Petitioners filed an Objection to the Discovery Commissioner Report and Recommendation (“DCRR”).<sup>11</sup> After the Opposition and Reply were filed, but without oral argument, the district court affirmed and adopted the DCRR.<sup>12</sup> The district court also found that “Defendant’s [sic] constitutionality argument is waived due to his failure to serve the Secretary of State pursuant to NRS 30.130.”<sup>13</sup>

## **V.**

### **ARGUMENT**

#### **A. Mandamus is the Appropriate Relief.**

“A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion.”<sup>14</sup> Mandamus is an extraordinary remedy, available when there is no “plain, speedy and adequate remedy in the ordinary course of law.”<sup>15</sup> Consideration of a writ is appropriate “[w]hen an important issue of law needs clarification and sound judicial economy

---

<sup>11</sup> Appendix Volume II, at APP000354-000495, Appendix Volume III, APP00496-APP000611.

<sup>12</sup> Volume III, at APP000700-APP000707.

<sup>13</sup> Volume III, at APP000700-APP000701.

<sup>14</sup> *Okada v. Eighth Judicial Dist. Ct.*, 134 Nev. 6, 8-9, 408 P.3d 566, 569 (2018).

<sup>15</sup> *Id.* at 9 (citing NRS 34.170).



and administration favor the granting of the petition.”<sup>16</sup> “A writ of mandamus may be issued to compel the district court to vacate or modify a discovery order.”<sup>17</sup> This Court will exercise its discretion to review discovery orders through writ petitions where the challenged discovery order is one that is likely to cause irreparable harm<sup>18</sup> or “if an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction.”<sup>19</sup>

Here, this Court should exercise its discretion by accepting this Petition because it raises the issue of whether NRS 52.380 is unconstitutional pursuant to the separation of powers doctrine incorporated in the Nevada Constitution, the interpretation of NRS 31.130 in the context of an Objection to a DCRR, and whether good cause ever exists for an observer and audio recording of the full NRCP 35 neuropsychological exam if doing so would require a Nevada licensed neuropsychologist to violate their professional and ethical obligations, and whether there is good cause under Rule 35 to require a neuropsychologist to produce raw test data, test questions and related materials where there is a risk a non-psychologist could directly view that information—in violation of applicable psychological

---

<sup>16</sup> *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007).

<sup>17</sup> *Okada v. Eighth Judicial Dist. Ct.*, 131 Nev. 834, 839-40, 359 P.3d 1106, 1110-11 (2015).

<sup>18</sup> *Id.* at 839-40.

<sup>19</sup> *Id.* at 840.

ethical and professional obligations. Without this Court’s intervention, irreparable harm will be experienced by parties having to face these issues. Clarification is also needed regarding the foregoing statutes and court rule. This Petition involves important issues of statewide significance regarding neuropsychological exams.

**B. The Standard of Review.**

“Conclusions of law, including the meaning and scope of statutes, are reviewed de novo.”<sup>20</sup> “Discovery matters,” on the other hand, “are within the district court’s sound of discretion” and is reviewed for an abuse of discretion.”<sup>21</sup> A district court abuses its discretion when its decision is based “on an erroneous legal standard or on clearly erroneous findings of fact”<sup>22</sup>, “disregards controlling law”<sup>23</sup> or “misapplies the correct legal standard[.]”<sup>24</sup>

**C. The District Court Abused its Discretion.**

1. The District Court erred in holding that Petitioners waived their constitutional challenge to NRS 52.380, failing to provide the Petitioners an opportunity to serve the Attorney General, and failing to consider the constitutional challenge on its merit.

---

<sup>20</sup> *Canarelli v. Dist. Ct.*, 136 Nev.Adv.Op. 29, 464 P.3d 114, 119 (2020).

<sup>21</sup> *Id.*

<sup>22</sup> *See Shores v. Global Experience Specialists, Inc.*, 422 P.3d 1238, 1241 (Nev. 2018).

<sup>23</sup> *Id.*

<sup>24</sup> *United States Department of the Treasury-IRS v. EB Holdings II, Inc.*, 2021 WL 535467, at \*2 (D.Nev. 2021).

The district court erred in holding that Petitioners waived their right to challenge the constitutionality of NRS 52.380 by not serving a copy of their Objection on the Nevada “Secretary of State.” NRS 30.130 provides:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.

The district court’s order is unclear as to what “service” Petitioners should have provided to the “Secretary of State”; presumably, the district court meant service of the Objection.<sup>25</sup> Had oral argument been held, clarification on this issue could have been obtained by Petitioners. Regardless, NRS 30.130 expressly holds the Attorney General be provided “a copy of the proceeding and be entitled to be heard.” Thus, the district court erred in denying the Objection based on the lack of “service” to the “Secretary of State.”

The district court further erred in interpreting NRS 30.130 contrary to its plain language. This Court construes a statute in accordance with its plain language.<sup>26</sup>

---

<sup>25</sup> Volume III, at APP000700-APP000701.

<sup>26</sup> *See Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007).

Nowhere in NRS 30.130 does the statute specify that failure to serve the Attorney General, where a statute's constitutionality is in question, constitute waiver of the constitutional challenge. The district court erred in applying the waiver doctrine. "Waiver requires the intentional relinquishment of a known right."<sup>27</sup> "If intent is to be inferred from conduct" the conduct must be "so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished."<sup>28</sup> Petitioner's oversight in not serving a copy of the Objection to the Attorney General does not constitute obvious conduct indicative of Petitioner's no longer challenging the constitutionality of NRS 52.380, especially considering that was a main argument raised in their Objection.

Instead, pursuant to *Crowley v. Duffrin*<sup>29</sup>, the district court should have allowed Petitioners an opportunity to serve the Attorney General, provided the Attorney General an opportunity to weigh in on the issue, and addressed the constitutional challenge on its merits. In *Crowley*, the attorney appellant entered into a contract with the district court to represent indigent clients; the attorney sought a declaration of contractual invalidity because his contract compensated him at a rate less than specified by statute.<sup>30</sup> In filing his declaratory action, however, the attorney

---

<sup>27</sup> *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007).

<sup>28</sup> *Id.*

<sup>29</sup> 109 Nev. 597, 855 P.2d 536 (1993).

<sup>30</sup> *Id.* at 598.

did not name the district court or county as parties. His case was dismissed by way of summary judgment based on a “misjoinder of parties.”<sup>31</sup>

Relying on NRS 30.130, this Court recognized “the district court and county should have been made parties to these proceedings.”<sup>32</sup> However, failure to join them in the suit did “not justify the entry of summary judgment” against the appellant. “The district court should have denied the motion for summary judgment and allowed” the appellant to join them in the case or the district court “should have effectuated the amendment *sua sponte*.”<sup>33</sup> This Court then considered the merits of the appellant’s claim.<sup>34</sup>

Here, the district court should have required Petitioners to serve the Attorney General, provided time for the Attorney General to brief the constitutional issue, and then held a hearing or otherwise considered the constitutional challenge on its merits. The district court’s failure to do so constitutes clear error.

2. The District Court erred in holding that the Legislature passing NRS 52.380 and the Governor signing it into law constitutes “good cause” under NRCP 35 to allow for a third-party observer and audio recording of the full examination.

The Legislature passing NRS 52.380 and the Governor signing it into law does not constitute “good cause” for allowing a third-party observer and audio recording

---

<sup>31</sup> *Id.* at 601-602.

<sup>32</sup> *Id.* at 602.

<sup>33</sup> *Id.* at 603.

<sup>34</sup> *Id.*

of the *full* examination because the Legislature and Governor did not have constitutional authority to adopt that statute into law. NRS 52.380 is a procedural statute that interferes with NRCP 35, and the ability to conduct examinations authorized thereunder, and therefore violates the separation of powers doctrine enshrined in Nevada’s Constitution, at Article 3§1.<sup>35</sup>

“The separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government.”<sup>36</sup> The Nevada Constitution “contains an express provision prohibiting any one branch of government from impinging on the functions of another.”<sup>37</sup> “As coequal branches, each of the three governmental departments ‘has power to administer its own affairs and perform its duties, so as not to become a subordinate branch of government.’”<sup>38</sup> “This separation is fundamentally necessary because ‘were the power of judging joined with the

---

<sup>35</sup> This provision provides, in relevant part: “The powers of the Government of the State of Nevada shall be divided into three separate departments, —the Legislative, —the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.”

<sup>36</sup> *Berkson v. Lepome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010) (citing *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004)).

<sup>37</sup> *Commission on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103-04 (2009) (citing *Secretary of State*, 120 Nev. at 466, 93 P.3d at 753).

<sup>38</sup> *Berkson*, 126 Nev. at 498, 245 P.3d at 564 (quoting *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007)).

legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislature.”<sup>39</sup>

In keeping with the theory of separation of powers, “the judiciary has the inherent power to govern its own procedures.”<sup>40</sup> Indeed, NRS 2.120 recognizes the Nevada Supreme Court is responsible for adopting rules of civil practice. Thus, the “legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and such a statute is of no effect.”<sup>41</sup>

NRCP 35 is procedural in nature because it governs the manner in which evidence is collected. NRS 52.380 is likewise procedural in nature because it too governs the manner in which evidence is collected. Importantly, the current version of NRCP took effect on March 1, 2019, while NRS 52.380 went into effect October 1, 2019.<sup>42</sup>

Pursuant to NRCP 35(a)(4)(A) and (B), a third-party observer may only be present during a neuropsychological exam if the plaintiff demonstrates good cause; moreover, the observer may not be the plaintiff’s attorney. NRS 52.380, however,

---

<sup>39</sup> *Berkson*, 126 Nev. at 498 (quoting *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237, 242 (1967)).

<sup>40</sup> *Berkson*, 126 Nev. at 499 (quoting *State v. Dist. Ct. [Marshall]*, 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000)).

<sup>41</sup> *Berkson*, 126 Nev. at 499 (quoting *Marshall*, 116 Nev. at 959, 11 P.3d at 1213).

<sup>42</sup> Appendix I, at APP00009-APP00010.

provides that an observer may attend a neuropsychological exam without the plaintiff first demonstrating good cause for that observer; moreover, the observer may be the attorney of the plaintiff.<sup>43</sup>

Additionally, NRS 35(a)(3) provides a plaintiff may only audio record a neuropsychological exam if the plaintiff first shows good cause. However, NRS 52.380(3) allows an observer to make an audio recording of the exam without first demonstrating good cause. Like Rule 35, NRS 52.380 provides procedures for the collection of specified types of evidence that may be relevant to a plaintiff's personal injury claim.

Judge Youchah, in *Freteluco v. Smith's Food and Drug Centers, Inc.*<sup>44</sup>, recently recognized that NRS 52.380 is procedural in nature, interferes with Federal Rule of Civil Procedure 35, and is therefore trumped by Rule 35. *Freteluco* is strong persuasive authority<sup>45</sup> and should be given serious consideration by the Court as it considers the exact same issues before this Court. In *Freteluco*, the defendant retained Dr. Etcoff to conduct a Rule 35 neuropsychological exam of the personal injury plaintiff. Plaintiff insisted the exam should be conditioned on a third-party

---

<sup>43</sup> NRS 52.380(1), (2), and (7).

<sup>44</sup> 336 F.R.D. 198 (2020).

<sup>45</sup> See *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (Nev. 2002) (federal case law interpreting the same rule of procedure as the corresponding Nevada rule of civil procedure is considered "strong persuasive authority" because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts).



observers and audio recording of the clinical interview. Dr. Etcoff did not disagree to the audio recording of the “clinical interview” portion of the examination. However, he objected to a third-party observer.<sup>46</sup>

The *Freteluco* Court concluded “that whether an observer is present in the neuropsychological examination of Plaintiff is not substantive, but is procedural.” “NRS 52.380 sets forth procedures applicable to observers who may attend independent medical examinations” and whether an audio recording is allowed without a showing of good cause.<sup>47</sup> NRS 52.380 reflects a “procedural preference”<sup>48</sup> and is not a substantive law that overrides Rule 35.<sup>49</sup>

NRS 52.380 and Rule 35 both set forth standards by which a court is to determine whether to allow a third-party observer in an exam and audio recording of the exam. The statute is unconstitutional because Rule 35 was adopted prior to the statute *and* the procedures the statute sets forth contradict the procedures set forth in Rule 35 to the point that Rule 35 neuropsychological exams cannot occur.

Therefore, because the Legislature and Governor did not have constitutional authority to enact NRS 52.380 into law, the statute does not constitute “good cause”

---

<sup>46</sup> 336 F.R.D. at 200.

<sup>47</sup> *Id.* at 203.

<sup>48</sup> *Id.* (quoting *Flack v. Nutribullett, LLC*, 333 F.R.D. 5008, 517 (C.D.Cal. 2019))

<sup>49</sup> *Id.*

to condition the neuropsychological Rule 35 exam upon a third-party observer and audio recording of the same.

3. The District Court abused its discretion by conditioning the NRCP 35 Examination on the Requirement that Dr. Etcoff, or any other Nevada licensed psychologist/neuropsychologist, violate his professional and ethical duties.

The district court erred in ruling that Dr. Etcoff must allow for a third-party observer and audio recording of his full examination, and requiring him to share the raw test data and related proprietary materials where there is a likelihood that information can be shared with non-psychologists, even though conducting the examination under these conditions would place Dr. Etcoff's psychological license in jeopardy.

In their Motion to Compel, Petitioners argued Dr. Etcoff was professionally and ethically prohibited by the professional rules governing Nevada licensed psychologists and neuropsychologists from conducting a Rule 35 exam under the aforementioned conditions.<sup>50</sup> In support of this position, Petitioners referenced a letter from the State of Nevada Board of Psychological Examiners to the Clerk of the Supreme Court, dated October 1, 2018 ("Board Letter").<sup>51</sup>

Plaintiff nowhere challenged the Board Letter in his Opposition, or that this letter supports Petitioners' position that Dr. Etcoff is professionally and ethically

---

<sup>50</sup> Appendix I, at APP000016-APP000020.

<sup>51</sup> Appendix I, at APP000172.

prohibited from conducting a Rule 35 exam under the conditions demanded by Plaintiff. Instead, Plaintiff cited to non-Nevada licensed psychologists' opinions in support of his position that Dr. Etcoff is not professionally and ethically prohibited from conducting the exam under the conditions.<sup>52</sup>

Plaintiff contended for the first time at the discovery hearing the Board Letter does not support the Petitioners' position and Dr. Etcoff's Nevada license will not be placed in jeopardy if he conducts the exam under the aforementioned conditions.<sup>53</sup>

In their Objection, the Petitioners submitted an Affidavit of Dr. Etcoff with supporting medical authorities, to address the new contention raised for the first time by Plaintiff during the discovery hearing.<sup>54</sup> In his Affidavit, Dr. Etcoff explains that third-party observers and audio recordings create test reliability and validity concerns due to "observer effects" and that the Nevada State Board of Psychological Examiners opposes third-party observers and audio recording in neuropsychological Rule 35 exams because they can "significantly alter the credibility and validity of results" and "prevent the examinee from disclosing crucial information essential to diagnosis."<sup>55</sup> Referencing the American Psychological Association *Ethical Principles of Psychologists and Code of Conduct* ["Code of Ethics"] adopted by

---

<sup>52</sup> Appendix I, at APP000198-APP000207.

<sup>53</sup> Appendix II, at APP000334-APP000335 (14:13-15:14); APP000337 (17:1-4); APP000342 (22:23-25).

<sup>54</sup> Appendix III, at APP000505-APP000594.

<sup>55</sup> Appendix III, at APP000506-APP000507 (2:17-3:1).

reference in NAC 641.250(1), Dr. Etcoff explains he is ethically prohibited from conducting neuropsychological tests (which are part of a Rule 35 neuropsychological exam) with third-party observers and audio recording.<sup>56</sup>

He then explains, again citing to the foregoing *Code of Ethics*, why he may not divulge test data and materials if there is a risk non-psychologists may directly view those materials.<sup>57</sup> In short, such disclosure compromises test security. “Public or lay person knowledge of the test materials runs the risk for coaching of individuals in the future, that may result in inflated test scores so individuals appear to have intact cognitive abilities when they do not.”<sup>58</sup>

Dr. Etcoff relays his genuine concerns if he were to violate his professional and ethical responsibilities his psychology license will be placed in jeopardy and counsel for Plaintiff would attempt to impeach his credibility at trial.<sup>59</sup>

Plaintiff will likely argue Dr. Etcoff’s Affidavit should not be considered because it was not submitted prior to the discovery hearing. However, in *Valley Health System, LLC v. Eighth Judicial Dist. Ct.*, this Court held a district court may not consider “new arguments raised in objection to a Discovery Commissioner’s Report and Recommendation *that could have been raised before the Discovery*

---

<sup>56</sup> *Id.*, at APP000507-APP000508 (3:6-4:5).

<sup>57</sup> *Id.*, at APP000508 (4:6-24).

<sup>58</sup> *Id.* (4:18-20).

<sup>59</sup> *Id.* at APP000508-APP000509 (4:25-5:3).

*Commissioner* but were not.”<sup>60</sup> Here, Petitioners were unaware of the need for an Affidavit from Dr. Etcoff prior to the discovery hearing, because Plaintiff never challenged the meaning of the Board Letter, i.e., that Dr. Etcoff’s professional license will be placed in jeopardy if he conducts an exam under the conditions placed by the Court, until the discovery hearing itself.

In sum, the district court erred in finding good cause for the Rule 35 examination conditions even though requiring Dr. Etcoff to perform the examination under those conditions would cause him to violate his professional and ethical obligations and place his psychological license in jeopardy.

4. The District Court’s order makes it impossible for Nevada psychologists and neuropsychologist to perform Rule 35 psychological/neuropsychological exams and creates an unfair advantage for the Plaintiff.

Plaintiff’s expert, Dr. Sunshine Collins, had the benefit and advantage of performing a neuropsychological examination on Plaintiff without any observer or audio recording or being required to share the raw test data, test questions and related materials under the risk of the information being disclosed to a non-psychologist. Pursuant to the district court’s order, Dr. Etcoff does not have the same benefit of conducting his examination under the same circumstances as Dr. Collins. Further, the conditions placed by the district court on the Rule 35 neuropsychological exam

---

<sup>60</sup> 127 Nev. 167, 173, 252 P.3d 676, 680 (2011) (emphasis added).

make it impossible for Dr. Etcoff, or any other Nevada licensed psychologist or neuropsychologist, from ever examining the Plaintiff.

Indeed, due to the ethical and professional limits placed on Nevada-licensed psychologists and neuropsychologist by NAC 641.250 and the Nevada State Board of Psychological Examiners, no Rule 35 psychological or neuropsychological exam will ever take place in Nevada civil cases if the exams are conditioned on permitting third-party observers and audio recordings of the full the exam, and requiring the psychologist/neuropsychologist to disclose the raw test data, test questions and related materials where there is a risk that non-psychologists, including attorneys, could review the raw materials.

If this were to occur, the very purpose of Rule 35—which is to level the playing field<sup>61</sup> between personal injury plaintiffs and defendants—will be defeated. This Court avoids statutory or procedural rule construction that leads to an absurd result.<sup>62</sup> Yet, here, if this Court upholds the district court’s ruling that is exactly what will occur. Defendants will be placed in a position where they cannot have a

---

<sup>61</sup> *Painter v. Atwood*, 2013 WL 54280589, at \*2 (D.Nev. 2013) (quoting *Ashley v. City & Cnty of San Francisco*, 2013 WL 2386655 (N.D. Cal. 2013) and citing *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D.Cal. 1995)) (“one of the purposes of Rule 35 is to level the playing field in cases where physical or mental condition is at issue, because ‘a plaintiff has ample opportunity for psychiatric or mental examination by his/her own practitioner or forensic expert.’”)

<sup>62</sup> *Sheriff, Clark County v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008).

psychologist or neuropsychologist of their choosing independently verify a personal injury plaintiff's neuropsychological claim through a Rule 35 exam.

**5. Rule 35 Should be Construed in Harmony with NAC 641.250.**

Additionally, this Court construes a rule or statute in harmony with other rules and statutes, including the Nevada Administrative Code.<sup>63</sup> Thus, this Court should construe Rule 35 in harmony with NAC 641.250. Again, NAC 641.250, which adopts by reference the *Code of Ethics*, prohibits third-party observation and recording of neuropsychological tests and disclosing test-related materials to non-psychologists. This Court should therefore hold that under Rule 35 there is never good cause to condition a neuropsychological exam upon third-party observation and recording of the full neuropsychological exam, and disclosing of test-related materials to psychologists if those materials could be viewed by non-psychologists, including attorneys.

**VIII.**

**CONCLUSION AND RELIEF SOUGHT**

Based on the foregoing, Petitioners respectfully request this Court issue a Writ of Mandamus. Respectfully, the district court unreasonably abused its discretion and

---

<sup>63</sup> See *Figueroa-Beltran v. United States*, 136 Nev. 386, 391, 467 P.3d 615, 621 (Nev. 2020) (quoting *Clay v. Eighth Judicial Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013); *City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011) (rules of statutory construction apply to administrative regulations)).

committed clear error by failing to considering Petitioner's constitutional challenge to NRS 52.380 and ordering that Plaintiff is permitted to have an observer and audio recording of the full NRCP 35 neuropsychological examination and conditioning that examination upon Dr. Etcoff producing the raw test data, test questions and related materials to Plaintiff's expert, who may share them directly with Plaintiff's attorney.

Accordingly, a Writ of Mandamus should issue: (1) holding that Defendants failure to serve a copy of their Objection to the Nevada Attorney General did not constitute a waiver of their argument that NRS 52.380 is unconstitutional, the district court should have provided Defendants an opportunity to serve a copy of the Objection on the Attorney General, and the district court should have considered the constitutional issue on its merits; (2) holding that NRS 52.380 is unconstitutional in that it violates the separation of powers doctrine; (3) compelling the district court to comply with Nevada Rules of Civil Procedure (NRCP) 35(a)(4)(A)(ii) and NRCP 35(a)(3) and grant its Objection; (4) compelling the district court to issue an order denying Plaintiff the presence of an observer or audio recording of his full neuropsychological examination; (5) compelling the district court to issue an order that allows Plaintiff's expert to have direct access to Dr. Etcoff's raw test data, test questions and related materials but does not allow the Plaintiff's attorney direct



access to that information; and (6) establishing the applicable good cause standards for NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3).

DATED: 12/14/21

DATED: 12/14/21

**DENNETT WINSPEAR, LLP**

**KEATING LAW GROUP**

By: /s/ Brent D. Quist  
RYAN L. DENNETT, ESQ.  
Nevada Bar No. 005617  
BRENT D. QUIST, ESQ.  
Nevada Bar No. 009157  
3301 N. Buffalo Drive, Suite 195  
Las Vegas, Nevada 89129  
Attorneys for Defendant,  
Chilly Willy's Handyman Service, LLC.

By: /s/ John T. Keating  
JOHN T. KEATING, ESQ.  
Nevada Bar No. 6373  
9130 W. Russell Road, Suite 200  
Las Vegas, Nevada 89148  
Attorneys for Defendant,  
David G. Martinez

## **CERTIFICATE OF SERVICE**

Per NRAP 21(a) and 25 (c), I certify that I am an employee of Dennett Winspear, LLP, and that on the 14th day of December, 2021, service of **Petition for Writ of Mandamus** was served via electronic means by operation of the Court's electronic filing system to:

<b>NAME</b>	<b>TEL., FAX &amp; EMAILS</b>	<b>PARTY REPRESENTING</b>
Ryan A. Loosvelt, Esq. Nevada Bar No. 8550 <b>GGRM LAW FIRM</b> 2770 S. Maryland Parkway Suite 100 Las Vegas, Nevada 89109	Telephone: (702) 384-1616 Facsimile: (702) 384-2990 Email: rloosvelt@ggrmlawfirm.com	<b>Plaintiff Taylor Miles Cape</b>
John T. Keating, Esq. Nevada Bar No. 6373 <b>KEATING LAW GROUP</b> 9130 W. Russell Road Suite 200 Las Vegas, Nevada 89148	Telephone: (702) 228-6800 Facsimile: (702) 228-0443	<b><i>Defendant David G. Martinez</i></b>
Aaron D. Ford, Esq. Nevada Bar No. 7704 <b>NEVADA OFFICE OF ATTORNEY GENERAL</b> 555 E. Washington Avenue #3900 Las Vegas, Nevada 89101	Telephone: (702) 486-3768 Facsimile: (702) 486-3420	
Honorable Judge Ronald J. Israel Department 28 200 Lewis Avenue Las Vegas, Nevada 89155	Telephone: (702) 366-1407	<b><i>Respondent Court</i></b>

\_\_\_\_\_  
/s/ Zaira Baldovinos

An Employee of DENNETT WINSPEAR, LLP